### UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION 21

2 SISTERS FOOD GROUP, INC.

and \* Case Nos.: 21-CA-38915

21-CA-38932

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION,

LOCAL 1167 \*

\* Case No. 21-RC-21137

FRESH & EASY NEIGHBORHOOD \* MARKET, INC., \*

Petitioning Party In Interest

## MOTION TO INTERVENE AND SUPPLEMENT THE RECORD

Fresh & Easy Neighborhood Market, Inc. ("Fresh & Easy" or the "Company"), as a party in interest and for the reasons set forth below, moves to intervene and to reopen the record in the above captioned matter. In support of its Motion, Fresh & Easy states as follows:

### I. FACTUAL BACKGROUND

Fresh & Easy operates retail grocery stores in California, Arizona and Nevada. It commenced operations in 2006 and opened it's first retail stores in November 2007. Between November 2007 and June 2010, the Company purchased its meat products from an outside vendor, 2 Sisters Food Group, Inc. ("2SFG").

On June 28, 2010, Fresh & Easy purchased all of the assets of 2SFG, which were primarily its meat processing plant located in Riverside, California. At or around June 28, 2010, Fresh & Easy established initial terms and conditions of employment and offered employment to all of 2SFG's former employees. A majority accepted employment with the company. 2SFG,

for all intense and purposes, no longer exists. See the attached Declaration of Mr. Hugh Cousins, of which we request be added to the formal record in this case.

Long before Fresh & Easy purchased the assets of 2SFG, specifically on July 17, 2009, pursuant to a stipulated election agreement entered into by 2SFG and the United Food and Commercial Workers Union Local 11167 ("the Union") and approved by the Regional Director on June 17, 2009, the Region conducted a representation election at 2SFG. The bargaining unit stipulated to by the Union and 2SFG is:

All full-time and regular part-time production employees, maintenance employees, technical/quality assurance employees, sanitation employees, shipping and receiving employees and plant clerical employees employed by the Employer at its [Riverside] facility ... excluding all other employees, temporary employees, office clerical employees, professional employees guards and supervisors as defined in the Act.

The Union lost the election by a vote of 66 in favor of Union representation and 87 against representation. Thereafter, the Union filed dozens of election objections based on alleged conduct by 2SFG. The objections were consolidated for a hearing along with certain unfair labor practice charges filed against 2SFG by the Union. A consolidated hearing was held before Administrative Law Judge Lana H. Parke ("ALJ Parke") who, on June 10, 2010, issued a decision and order finding that 2SFG had engaged in unfair labor practices and also certain objectionable conduct which impacted the election outcome. As a result, ALJ Parke recommended, in addition to remedial actions regarding the unfair labor practices, that the election be set aside and a re-run election be conducted.

As explained more fully below, controlling National Labor Relations Board ("Board") and U.S. Supreme Court precedent do not allow for a re-run election in these circumstances.

### II. ARGUMENT

A re-run election cannot be ordered because such an election would be predicated upon a stipulated election agreement to which Fresh & Easy was not a party. Therefore, this stipulated election agreement is invalid or, even if valid, voidable by Fresh & Easy. Furthermore, even if Fresh & Easy is a *Golden State* successor to 2SFG, there is no basis on which to hold the former liable for the latter's objectionable conduct.

## A. The Stipulated Election Agreement Is No Longer A Valid Contract

A stipulated election agreement is a contract between the signatory parties in which each party waives its statutory right to a hearing in exchange for specifically negotiated terms regarding the bargaining unit description, voter eligibility issues and the election process itself. See Highlands Hosp. Corp. d/b/a Highlands Reg. Med. Ctr., 327 N.L.R.B. 1049, 1050 (1999) ("the Board has long held that election agreements are contracts binding on the parties who executed them . . . ."). Because a stipulated election agreement is a contract, basic contract law principles are applicable in analyzing issues resulting from a stipulated election agreement. See Tidewater Oil Company v. NLRB, 358 F.2d 363, 365(2nd Cir. 1966) (the Board's "function is limited to construing the agreement according to contract principles and its discretion [to alter the contract] is gone"). As a matter of basic contract law, a successor in interest does not assume liability for a predecessor's contract unless the successor expressly agrees to do so. Golden State Bottling v. NLRB, 414 U.S. 168, 182 ("the general rule of corporate liability is that when a corporation sells all of its assets to another, the latter is not responsible for seller's debts and liabilities").

The terms of a stipulated election agreement are important contractual agreements between a union and an employer, and are unique to the parties who negotiated them. As such, there can be no assumption that a successor employer under the National Labor Relations Act

("Act") would find the unique election terms negotiated by the predecessor acceptable. See T & Leasing, 318 N.L.R.B. 324, 326(1995) ("it is not unusual for the parties to negotiate long and hard for their respective positions on those issues"). Indeed, there are multiple terms beyond the mere agreement to have an election that the Board and the courts have found "material," such that the failure of a party or the Board to abide by them constitutes a breach of contract. See Wells Fargo Alarm Services, 289 N.L.R.B. 562 (1988) (unit description); Windham Comm. Mem. Hosp., 312 N.L.R.B. 54 (1993) (eligibility of certain employees); Summa Corp v. NLRB, 625 F.2d 293 (9th Cir. 1980) (method and time of election).

Here, there is no evidence that Fresh & Easy did or would have agreed to any of the stipulated election agreement terms negotiated and agreed upon by 2SFG and the Union.

Moreover, Fresh & Easy did not assume this agreement when it purchased 2SFG's assets.

Therefore, the Board has no legal authority to require that Fresh & Easy to accept or abide by the terms of that contract.

## B. Fresh & Easy Can Void The Stipulated Election Agreement

The Board has held that a change regarding the identity of the entities involved in the representation case proceeding warrants voiding a stipulated election agreement or allowing a party to withdraw from the agreement, due to the potential confusion among the voters in such circumstances. *See Sunnyvale Medical Clinic*, 241 N.L.R.B. 1156, 1157 (1979) ("conditions which created a grave possibility for confusion as to the identities [of the parties to an election] resulted in changed circumstances which were grounds for granting the Employer's request to withdraw from the election agreement. Accordingly, the parties must be afforded the opportunity to enter into a new agreement or to participate in a pre election hearing."); *Andrie, Inc.*, 7-RC-18255 (unpublished Board Order dated May 25, 1989) (vacating stipulated election

agreement, setting aside election and remanding case to Regional Director because of an issue regarding the appropriate parties on the ballot). <sup>1</sup>

In the instant case, a re-run election certainly would be confusing to bargaining unit employees because there would be a different employer involved in the re-run election that is being held only because of actions by agents of the seller. These employees would justifiably wonder why they are voting for union representation to allow collective bargaining with an employer with whom they have not sought collective bargaining. This is not only confusing, but fundamentally unfair to Fresh & Easy and to its' employees.

# C. There Is No Basis For A Rerun Election Even If Fresh & Easy Is A Golden State Successor

Fresh & Easy was not the employer when the representation petition was filed. It did not commit or have knowledge of the objectionable and/or unlawful conduct giving rise to the proposed second election. It was not the employer when the second election was recommended by the ALJ. Most critically, Fresh & Easy was not a party to the stipulated election agreement. Therefore, assuming (without conceding) that Fresh & Easy is a successor employer for purposes of assuming liability for 2SFG's conduct pursuant to the Supreme Court's decision in *Golden State Bottling v. NLRB*, 414 U.S. 168 (1973), this liability does not extend to any findings of objectionable conduct by 2SFG.

The Board's authority to compel a successor employer to remedy the liabilities of a predecessor is limited in several respects. These limitations foreclose Fresh & Easy being ordered to participate in a re-run election. First, the Court's decision in *Golden State*, which

<sup>&</sup>lt;sup>1</sup> On June 25, 2010 a FOIA request was submitted to the Board requesting a copy of the May 25,1989 order. By letter dated June 30, 2010 the Executive Secretary advised that the files had been destroyed and therefore a copy could not be provided. It is inexplicable that the Board chose not to publish such a substantive decision and even more inexplicable that it did not maintain a formal copy.

provided that a successor may be found liable for its predecessor's unfair labor practices, was based on the Board's remedial authority under Section 10 of the Act. But, the Board's Section 10 remedial powers are limited to unfair labor practices as defined in Section 8 of the Act, and do not extend to representation cases which, of course, are governed by Section 9 of the Act. In the case at hand, ALJ Parke ordered the rerun election pursuant to Section 102.69 of the Board's Rules and Regulations which regulate Board proceedings under Section 9 of the Act, not Sections 8 and 10. Therefore, ALJ Parke lacks the statutory authority to recommend and the Regional Director lacks the authority to direct a re-run election (pursuant to Section 9 of the Act ) at Fresh & Easy even if it is a *Golden State* successor to 2SFG.

Second, even assuming the re-run election was ordered pursuant to an unfair labor practice, the Board is without authority to compel Fresh & Easy to participate in a re-run election which is predicated upon a contract to which Fresh & Easy is not a party. As the *Golden State* Court noted, a new employer cannot be bound to a contract of its predecessor "inasmuch as Sec. 8(d) of the Act as well as the legislative history of the labor laws, reflected a policy against compelling a party to agree to substantive contractual obligations." *Id.* at 183 (citing *NLRB v. Burns Int'l Security Services, Inc.*, 406 U.S. 272 (1972). Yet, this is exactly what Fresh & Easy would improperly be compelled to do, which is why the ordered re-run election cannot proceed.<sup>2</sup>

Although the Board applied successorship principles to determine whether a successor employer was bound in representation proceedings in *Jen-Weld of Everett, Inc.*, 285 N.L.R.B. 118, 118 n. 1 (1987), the employers in that case never disputed the Regional Director's determination that successorship principles apply in representation proceedings, or that a "successor" employer can be bound by decisions made in such proceedings. Not surprisingly, the Board upheld the Regional Director's analysis in these regards without any reasoning or analysis whatsoever, and focused instead on the principle issue in the case, *i.e.*, whether employees who had been economic strikers for more than one year were eligible to vote in a rerun election. *Id.* at 118, 121-22. Most importantly, however, the original election was not pursuant to a stipulated election agreement (*i.e.*, a contract) but, rather, was the result of a Board-

### III. CONCLUSION

For the foregoing reasons, Fresh & Easy should be allowed to intervene in this matter and the record reopened, to avoid Fresh & Easy being impermissibly forced into a representation election pursuant to a stipulated election agreement to which it is not a party or otherwise bound.

Respectfully submitted,

Fresh & Easy Neighborhood Market Inc.

By:

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## **CERTIFICATE OF SERVICE**

I hereby certify that on this 26th day of July, 2010, I caused copies of the

# MOTION TO INTERVENE AND SUPPLEMENT THE RECORD to be served on

the following parties by facsimile and U.S. Mail.

Irma Hernandez, Esq., Attorney Jean C. Libby, Esq., Field Attorney National Labor Relations Board Region 21 888 South Figueroa Street, 9th Floor Los Angeles CA 90017-5449	David A. Rosenfeld, Esq. Weinberg Roger & Rosenfeld PC 1001 Marina Village Parkway Suite 200 Alameda, CA 94501-1092
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WORKERS INTERNATIONAL	*		
UNION,	*		
LOCAL 1167	*		
	*	Case No.	21-RC-21137
and	*		
,	*		
FRESH & EASY NEIGHBORHOOD	*		
MARKET, INC.,	*		
	*		
Petitioning Party In Interest	*		

### **DECLARATION OF HUGH COUSINS**

I, Hugh Cousins, based on my own personal knowledge, state as follows:

- 1. I am the Chief Human Resources Officer for Fresh & Easy Neighborhood Market, Inc. ("Fresh & Easy"). As such, I am personally knowledgeable regarding the purchase of the assets of 2 Sisters Food Group, Inc. ("2SFG") by Fresh & Easy.
- 2. On June 28, 2010, Fresh & Easy purchased all of the assets of 2SFG. These assets primarily constituted its Riverside, California, meat processing facility.
- 3. I also am personally knowledgeable regarding the offer of employment made by Fresh & Easy to the former employees of 2SFG and in the establishment of the initial terms and conditions of employment upon which those offers of employment were based.
- 4. These initial terms and conditions of employment were significantly different than those provided by 2SFG.

5. A majority of the former employees of 2SFG accepted our offer and are now employees of Fresh & Easy.

I declare under penalty of perjury that the foregoing is true and correct.

Hugh Cousins

Dated: July 26, 2010